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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION NINE

2037649

IN THE MATTER OF: Krik Well #80 Tank Site Huntington Beach, California Cannery Hamilton Properties LLC, Respondent	ADMINISTRATIVE ORDER ON CONSENT U.S. EPA Region 9 CERCLA Docket No. 9-2004-0018 Proceeding Under Section 106 of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, 42 U.S.C. § 9606

I. JURISDICTION AND GENERAL PROVISIONS

1. This Administrative Order on Consent (the "Agreement") is entered into voluntarily by the United States Environmental Protection Agency ("EPA") and Cannery Hamilton Properties LLC ("Cannery Hamilton"), a California limited liability company. This Agreement provides for the performance of a Removal Action and the reimbursement of response costs EPA incurs in oversight of the Removal Action regarding the hazardous substances stored in tanks at the Ascon Dump Site, near the intersection of Magnolia and Hamilton, in Huntington Beach, Orange County, California (the "Site").

2. This Agreement is entered into under the authority vested in the President of the United States by Sections 104(a), 106(a) and 122(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9604(a), 9606(a) and 9622(a).

3. EPA has notified the state of California of this action pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a).

4. EPA and Cannery Hamilton recognize that this Agreement has been negotiated in good faith and that neither the actions undertaken by the Cannery Hamilton in accordance with this Agreement, nor the fact that the Cannery Hamilton has entered into the Agreement shall constitute an admission of any fact, fault, legal issue or liability. Cannery Hamilton does not admit, and retains the right to controvert in any proceedings other than proceedings to implement or enforce this Agreement, the validity of the findings of facts, conclusions of law, and determinations in Sections IV and V of this Agreement. Cannery Hamilton agrees to comply with and be bound by the terms of this Agreement and further agrees that it will not contest the basis or validity of this Agreement or its terms in proceedings to enforce this Agreement.

II. PARTIES BOUND

5. This Agreement applies to and is binding on EPA and on Cannery Hamilton, and its successors and assigns, collectively referenced as the "Parties" to this Agreement. Any change in operation or status of Cannery Hamilton, including but not limited to, any transfer of assets or real or personal property, shall not alter its responsibilities under this Agreement.

III. DEFINITIONS

6. Unless otherwise expressly provided herein, terms used in this Agreement that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. The Parties agree that the terms of this Agreement, including defined terms, shall not be interpreted as an admission of any factual or legal issue. Whenever terms listed below are used in this Agreement, the following definitions shall apply:

a. "Agreement" shall mean this Administrative Order on Consent, EPA Docket No. CERCLA 9-2004-0018.

b. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601, *et seq.*

c. "Day" shall mean a calendar day. In computing any period of time under this Agreement, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.

d. "Effective Date" shall be the effective date of this Agreement as provided in Section XXIX.

e. "EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

f. "Interest" shall mean interest at the current rate specified for interest on investments of the Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate in of interest shall be the rate in effect at the time that the interest accrues. The rate of interest is subject to change on October 1 of each year.

g. "National Contingency Plan" or "NCP" shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

h. "Paragraph" shall mean a portion of this Agreement identified by an Arabic numeral.

i. "Parties" shall mean EPA and Cannery Hamilton.

j. "RCRA" shall mean the Solid Waste Disposal Act (also known as the Resource Conservation and Recovery Act), as amended, 42 U.S.C. §§ 6901, *et seq.*

k. "Removal Action" shall mean all activities to assess, characterize and remove hazardous substances from the Site, including those activities specified in the Work Plan that Cannery Hamilton provides to EPA pursuant to Section VIII of this Agreement.

l. "Respondent" shall mean Cannery Hamilton Properties LLC, also referred to in this Agreement as "Cannery Hamilton."

m. "Response Costs" shall mean any costs that the United States has incurred or may incur in relation to the response action at the Site, which are recoverable pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607, and include, but are not limited to: direct and indirect costs

incurred in reviewing or developing work plans, reports or other documents; verifying the performance of investigative, planning or removal work; payroll, contractor, travel and laboratory costs; and costs otherwise incurred implementing, overseeing or enforcing any person's removal obligation.

n. "Section" shall mean a portion of this Agreement identified by a Roman numeral.

IV. FINDINGS OF FACT

7. Cannery Hamilton is incorporated in the state of Delaware, has offices at 6001 Bollinger Canyon Road, San Ramon, California (94583), and maintains a business presence in Huntington Beach, California, through its ownership and use of the Site. Cannery Hamilton owns the real property that is the Site.

8. On or about March 17, 2004, an abandoned oil production well at the Site ruptured and began to discharge crude oil. Cannery Hamilton initiated a response to the discharged oil. While overseeing the response to the oil discharge, EPA became aware that the Site included two abandoned 500 barrel above ground storage tanks, two above ground clarifiers and one horizontal cylinder tank approximately ten feet long with a four foot diameter. All of the tanks are steel, and there is observable evidence of minor leaking along riveted seams. Sampling and analysis disclosed that the tanks contained a mixture of motor oil, gasoline, methyl tertbutyl ether and various solvents. More specifically, the sample results confirmed the presence of benzene, toluene, tetrachloroethene and naphthalene, which are listed "hazardous constituents" at 40 C.F.R. Part 261, Appendix VIII. Four of ten samples demonstrated a flash point below 140 degrees Fahrenheit, and thereby demonstrates the hazardous characteristic of ignitability as defined at 40 C.F.R. § 261.21.

9. Cannery Hamilton is entering into this Agreement to provide a timely and efficient response to the hazardous substances in the above ground storage tanks at the Site.

V. CONCLUSIONS OF LAW AND DETERMINATIONS

10. Based on the Findings of Fact set forth above, EPA has determined that:

a. The Site is a "facility" as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

b. The contaminants at the Site, as identified in the Findings of Fact above, include "hazardous substances" as defined by Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

c. Cannery Hamilton is a "person" as defined by Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

d. Cannery Hamilton is an appropriate party to enter into this agreement for a response action pursuant to Sections 104(a) and 122(a) of CERCLA, 42 U.S.C. §§ 9604(a) and 9622(a).

e. The conditions described in the Findings of Fact above constitute an actual or threatened "release" of a hazardous substance from the facility as defined by Section 101(22) of CERCLA, 42 U.S.C.§ 9601(22).

f. The Removal Action provided by this Agreement is necessary to protect the public health, welfare, or the environment and, if carried out in compliance with the terms of this Agreement, will be consistent with the NCP, as provided in Section 300.700(c)(3)(ii) of the NCP.

VI. ORDER

Based on the foregoing Findings of Fact, Conclusions of Law, Determinations and the Administrative Record for this Site, it is hereby Ordered and Agreed that Respondent shall comply with all provisions of this Agreement, including, but not limited to, any attachments to this Agreement and all documents incorporated by reference into this Agreement.

VII. DESIGNATION OF CONTRACTOR, PROJECT COORDINATOR, AND ON-SCENE COORDINATOR

11. Respondent shall retain one or more contractors to perform the work required by this Agreement and shall notify EPA of the name(s) and qualifications of such contractor(s) within three (3) days of the Effective Date. Respondent also shall notify EPA of the name(s) and qualification(s) of any other contractor(s) or subcontractor(s) retained to perform the work at least two (2) days prior to commencement of such work. EPA retains the right to disapprove of any or all of the contractors and/or subcontractors retained by Respondent. If EPA disapproves of a selected contractor, Respondent shall retain a different contractor and shall notify EPA of that contractor's name and qualifications within two (2) days of EPA's disapproval.

12. Within three (3) days after the Effective Date, Respondent shall designate a Project Coordinator who shall be responsible for administration of all actions by Respondent required by this Agreement and shall submit to EPA the designated Project Coordinator's name, address, telephone number, and qualifications. To the greatest extent possible, the Project Coordinator shall be present on Site or readily available during Site work. EPA retains the right to disapprove of the designated Project Coordinator. If EPA disapproves of the designated Project Coordinator, Respondent shall retain a different Project Coordinator and shall notify EPA of that person's name, address, telephone number, and qualifications within three (3) days following EPA's disapproval. Receipt by Respondent's Project Coordinator of any notice or communication from EPA relating to this Agreement shall constitute receipt by Respondent.

13. EPA has designated Robert Wise of the Emergency Response Office, Region 9, as its On-Scene Coordinator ("OSC"). Except as otherwise provided in this Agreement, Respondent shall direct all submissions required by this Agreement to the OSC at:

Robert Wise
U.S. Environmental Protection Agency
c/o State Lands Commission
200 Oceangate, Suite 900
Long Beach, CA 94105
(562) 499-6312

14. EPA and Respondent shall have the right, subject to Paragraph 12, to change their respective designated OSC or Project Coordinator. Respondent shall notify EPA three (3) days before such a change is made. The initial notification may be made orally, but shall be promptly followed by a written notice.

VIII. WORK TO BE PERFORMED

15. Respondent shall restrict access to the Site in a manner subject to EPA approval. Respondent shall not allow any materials, equipment, or any other item to be removed from the Site without prior EPA approval.

16. Within fifteen (15) days after the Effective Date of this Agreement, Respondent shall submit to EPA for approval a Work Plan for the removal of hazardous substances from the Site. The Work Plan shall provide a concise description of the activities to be conducted to comply with the requirements of this Agreement, and shall include a proposed schedule for implementing and completing such activities. The Work Plan shall comply with the guidelines for preparation provided in Paragraph 17, below, and, at a minimum, shall require Respondent to perform and complete the following removal activities within sixty (60) days after EPA approves the Work Plan pursuant to Paragraphs 17 and 20 of this Agreement:

a) Restrict unauthorized access by persons or vehicles entering the facility;
b) Sample and characterize the material in the above ground tanks near Well #80 at the Site;
c) Perform air monitoring and sampling in accordance with Occupational Safety and Health Administration ("OSHA") regulations during all phases of the removal action, especially when there is a potential for airborne releases of toxic air contaminants. Operational controls such as dust containment or suppression will be used to abate fugitive dust emissions;
d) Properly transport and dispose of, in accordance with all applicable or appropriate regulations, all hazardous substances within the tanks. Each transfer of hazardous substances, pollutants or contaminants Off-Site must be consistent with Section 121(d)(3) of CERCLA, 42 U.S.C. § 9621(d)(3), and the EPA "Revised Procedures for Implementing off-Site Response Actions," (OSWER Directive 98343.11,

November 13, 1987). Before shipping any hazardous substances, pollutants, or contaminants from the Site to any Off-Site location, Respondent shall obtain EPA's certification that the proposed receiving facility is operating in compliance with the requirements of CERCLA Section 121(d)(3), 42 U.S.C. § 9621(d)(3), and 40 C.F.R. § 300.440. Respondents shall, prior to any Off-Site shipment of waste material from the Site to an out-of-state waste management facility, provide written notification of such shipment to the appropriate state environmental official in the receiving facility's state and to EPA's OSC. This notification requirement shall not apply when the total volume of all such shipments will not exceed ten cubic yards. Respondent shall include in the written notification the following information: 1) the name and location of the facility to which the waste material is to be shipped; 2) the type and quantity of the waste material to be shipped; 3) the expected schedule for the shipment of the waste material; and 4) the method of transportation. Respondent shall notify the state in which the planned receiving facility is located of major changes in the shipment plan, such as a decision to ship the waste material to another facility within the same state, or to a facility in another state.

e) Remove any remaining contaminated equipment, structures, and debris for proper disposal or other disposition;

f) Provide EPA with copies of all documentation related to off-Site disposal or other disposition of wastes including, but not limited to, manifests, waste profiles and analytical data and disposal costs;

g) Notify EPA at least twenty-four (24) hours prior to commencement of any on-Site work. Notify EPA at least forty-eight (48) hours prior to disposal or other disposition of wastes.

17. The Work Plan required in Paragraph 16 shall be reviewed by EPA, which may approve, disapprove, require revisions, or modify the Work Plan in whole or in part. Once approved, the Work Plan shall be deemed to be incorporated into and made a fully enforceable part of this Agreement. The Respondent shall implement all work plans as finally approved by the EPA. In addition to the requirements listed in Paragraph 16, the Respondent shall submit with the Work Plan:

a) A Health & Safety Plan, prepared in accordance with EPA's Superfund Standard Operating Safety Guide, dated June 1992 (PUB 9285.1-03, PB 92-963414), which complies with all current OSHA regulations applicable to Hazardous Waste Operations and Emergency Response, 29 C.F.R. Part 1910. If EPA determines that it is appropriate, the plan shall also include a contingency plan. Respondent shall incorporate all changes to the Health & Safety Plan recommended by EPA and implement the Health & Safety Plan throughout the performance of the removal action; and

b) . A Quality Assurance Project Plan ("QAPP") that is consistent with EPA Guidance for Quality Assurance Project Plans (EPA QA/G-5); Preparation of a U.S. EPA Region 9 Field Sample Plan for EPA-Lead Superfund Projects (Document Control No.: 9QA-05-

93); and Guidance for the Data Quality Objectives Process (EPA QA/G-4). Respondent shall ensure that the laboratory used to perform any analyses participates in a QA/QC program that complies with the appropriate EPA guidance. Respondent shall only use laboratories that have a documented Quality System that complies with ANSI/ASQC E-4 1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs" (American National Standard, January 5, 1995), and "EPA Requirements for Quality Management Plans (QA/R-2) (EPA/240/B-01/002, March 2001)," or equivalent documentation as determined by EPA. EPA may consider and approve laboratories accredited under the National Environmental Laboratory Accreditation Program ("NELAP") as meeting the Quality System requirements.

18. Respondent shall provide EPA with written weekly summary reports. These reports should contain a summary of the previous week's activities to comply with this Agreement and anticipated activities toward compliance with this Agreement. On request by EPA, Respondent shall allow EPA or its authorized representatives to take split and/or duplicate samples. Respondent shall notify EPA not less than two days in advance of any sample collection activity, unless shorter notice is agreed to by EPA. EPA shall have the right to take any additional samples that EPA deems necessary. On request, EPA shall allow Respondent to take split or duplicate samples of any samples EPA takes as part of its oversight of Respondent's implementation of the response action.

19. Within thirty (30) days after completion of all response work required by this Agreement, Respondent shall submit for EPA review and approval a final report summarizing the actions taken to comply with this Agreement. The final report shall conform, at a minimum, with the requirements set forth in Section 300.165 of the NCP entitled "OSC Reports." The final report shall include a listing of the quantities and types of materials removed off-Site or handled on-Site, a discussion of removal and disposal options considered for those materials, a listing of the ultimate destination(s) of those materials, a presentation of the analytical results of all sampling and analyses performed, and accompanying appendices containing all relevant documentation generated during the removal action (*e.g.*, manifests, invoices, bills, contracts, and permits). The final report shall also include the following certification signed by a person who supervised or directed the preparation of that report:

"Under penalty of law, I certify that to the best of my knowledge, after appropriate inquiries of all relevant persons involved in the preparation of the report, the information submitted is true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

20. All documents, including technical reports, and other correspondence to be submitted by the Respondent pursuant to this Agreement shall be sent by over-night mail to the OSC as instructed in Paragraph 13. Respondent shall submit two (2) copies of each document to EPA.

21. EPA shall review, comment, and approve or disapprove, in whole or in part, each plan, report, or other deliverable submitted by Respondent. All EPA comments on draft deliverables shall be incorporated by the Respondent. EPA shall notify the Respondent in writing of EPA's approval or disapproval of a final deliverable. In the event of any disapproval, EPA shall specify the reasons for such disapproval, EPA's required modifications, and a time frame for submission of the revised report, document, or deliverable. If the modified report, document or deliverable is again disapproved by EPA, EPA first shall notify the Respondent of its disapproval of the resubmitted report, document, or deliverable, and then may draft its own report, document or deliverable and incorporate it as part of this Agreement, may seek penalties from the Respondent for failing to comply with this Agreement, and may conduct the remaining work required by this Agreement and seek to recover costs from Respondent.

VIII. SITE ACCESS

22. If the Site, or any other property where access is needed to implement this Agreement, is owned or controlled by the Respondent, Respondent shall, commencing on the Effective Date, provide EPA and its representatives, including contractors, with access at all reasonable times to the Site or such other property for the purpose of conducting any activity related to this Agreement.

23. Where any action under this Agreement is to be performed in areas owned by or in possession of someone other than Respondent, Respondent shall use its best efforts to obtain all necessary access agreements within ten (10) days after the Effective Date, or as otherwise specified in writing by the OSC. Respondent shall immediately notify EPA if, after using its best efforts, it is unable to obtain such agreements. For purposes of this Paragraph, "best efforts" includes the payment of reasonable sums of money in consideration of access. Respondent shall describe in writing its efforts to obtain access. EPA may then assist Respondent in gaining access to the extent necessary to effectuate the response actions described herein, using such means as EPA deems appropriate. Respondent shall reimburse EPA for all costs and attorney's fees incurred by the United States in obtaining such access, in accordance with the procedures in Section XIV (Payment of Response Costs).

24. Notwithstanding any provision of this Agreement, EPA retains all of its access authorities and rights, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.

IX. ACCESS TO INFORMATION

25. Respondent shall provide to EPA, on request, copies of all documents and information within its possession or control or that of its contractors or agents relating to activities at the Site or to the implementation of this Agreement, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the response action. Respondent also shall make available to EPA, for purposes of investigation, information

gathering, or testimony, its employees, agents, or representatives with knowledge of relevant facts concerning the performance of the response action.

26. Respondent may assert business confidentiality claims covering part or all of the documents or information submitted to EPA under this Agreement to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or information determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when they are submitted to EPA, or if EPA has notified Respondent that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2, Subpart B, the public may be given access to such documents or information without further notice to Respondent.

27. Respondent may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Respondent asserts such a privilege in lieu of providing documents, it shall provide EPA with the following: 1) the title of the document, record, or information; 2) the date of the document, record, or information; 3) the name and title of the author of the document, record, or information; 4) the name and title of each addressee and recipient; 5) a description of the contents of the document, record, or information; and 6) the privilege asserted by Respondent. However, no documents, reports or other information created or generated pursuant to the requirements of this Agreement shall be withheld on the grounds that they are privileged.

28. No claim of confidentiality shall be made with respect to any data, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Site.

X. RECORD RETENTION

29. Until 10 years after Respondent's receipt of EPA's notification pursuant to Section XXVIII (Notice of Completion of Work), Respondent shall preserve and retain all non-identical copies of records and documents (including records or documents in electronic form) now in its possession or control or which come into its possession or control that relate in any manner to the performance of the response action or the liability of any person under CERCLA with respect to the Site, regardless of any corporate retention policy to the contrary. Until ten (10) years after Respondent's receipt of EPA's notification pursuant to Section XXVIII (Notice of Completion of Work), Respondent also shall instruct its contractors and agents to preserve all documents, records, and information of whatever kind, nature or description relating to performance of the response action.

30. At the conclusion of this document retention period, Respondent shall notify EPA at least 90 days prior to the destruction of any such records or documents, and, on request by EPA, Respondent shall deliver any such records or documents to EPA. Respondent may assert that

certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Respondent asserts such a privilege, it shall provide EPA with the following: 1) the title of the document, record, or information; 2) the date of the document, record, or information; 3) the name and title of the author of the document, record, or information; 4) the name and title of each addressee and recipient; 5) a description of the subject of the document, record, or information; and 6) the privilege asserted by Respondent. However, no documents, reports or other information created or generated pursuant to the requirements of this Agreement shall be withheld on the grounds that they are privileged.

31. Respondent hereby certifies that to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information (other than identical copies) relating to its potential liability regarding the Site since notification of potential liability by EPA or the State or the filing of suit against it regarding the Site and that it has fully complied with any and all EPA requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

XI. COMPLIANCE WITH OTHER LAWS

32. Respondent shall perform all actions required pursuant to this Agreement in accordance with all applicable local, state, and federal laws and regulations except as provided in Section 121(e) of CERCLA, 42 U.S.C. § 6921(e), and 40 C.F.R. §§ 300.400(e) and 300.415(j). In accordance with 40 C.F.R. § 300.415(j), all on-Site actions required pursuant to this Agreement shall, to the extent practicable as determined by EPA considering the exigencies of the situation, attain applicable or relevant and appropriate requirements ("ARARs") under federal environmental, state environmental or facility siting laws.

XII. EMERGENCY RESPONSE AND NOTIFICATION OF RELEASES

33. In the event of any action or occurrence during performance of the response action which causes or threatens a release of hazardous substances from the Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Respondent shall immediately take all appropriate action. Respondent shall take these actions in accordance with all applicable provisions of this Agreement, including, but not limited to, the Health and Safety Plan, in order to prevent, abate or minimize such release or endangerment caused or threatened by the release. Respondent also shall immediately notify the OSC or, in the event of his unavailability, the Regional Duty Officer, at (800) 726-6741, of the incident or Site conditions. In the event that Respondent fails to take appropriate response action as required by this Paragraph, and EPA takes such action instead, Respondent shall reimburse EPA all costs of the response action not inconsistent with the NCP pursuant to Section XIV (Payment of Response Costs).

34. In addition, in the event of any release of a hazardous substance from the Site, Respondent shall immediately notify the OSC and the National Response Center at (800) 424-8802. Respondent shall submit a written report to EPA within seven (7) days after each release, setting forth the events that occurred and the measures taken or to be taken to mitigate any release or endangerment caused or threatened by the release and to prevent the reoccurrence of such a release. This reporting requirement is in addition to, and not in lieu of, reporting under Section 103(c) of CERCLA, 42 U.S.C. § 9603(c), and Section 304 of the Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. § 11004, *et seq.*

XIII. AUTHORITY OF ON-SCENE COORDINATOR

35. The OSC shall be responsible for overseeing Respondent's implementation of this Agreement. The OSC shall have the authority vested in an OSC by the NCP, including the authority to halt, conduct, or direct any response action required by this Agreement, or to direct any other removal action undertaken at the Site. Absence of the OSC from the Site shall not be cause for stoppage of work unless specifically directed by the OSC.

XIV. PAYMENT OF RESPONSE COSTS

36. Payments for Response Costs.

a. Respondent shall pay EPA all Response Costs. On a periodic basis, EPA will send Respondent a bill requiring payment, which shall provide a cost summary of direct and indirect costs incurred by EPA and its contractors. Respondent shall make all payments within thirty (30) days of receipt of each bill requiring payment, except as otherwise provided in this Agreement.

b. Respondent shall make all payments required by this Paragraph by a certified or cashier's check or checks made payable to "EPA Hazardous Substance Superfund," referencing the name and address of the party making payment and the docket number of this Agreement. Respondent shall send the check(s) to:

Hazardous Substance Superfund
U.S. Environmental Protection Agency, Region 9
Attn: David Wood, Superfund Accounting
P.O. Box 360863M
Pittsburgh, PA 15251

c. At the time of payment, Respondent shall send notice that payment has been made to:

David Wood
Superfund Accounting (PMD-6)
U.S. Environmental Protection Agency

75 Hawthorne Street
San Francisco, CA 94105

d. The total amount to be paid by Respondent pursuant to Paragraph 36(a) shall be deposited by EPA to the EPA Hazardous Substance Superfund.

37. In the event that the payment for Response Costs is not made within thirty (30) days of the Respondent's receipt of a bill, Respondent shall pay Interest on the unpaid balance. The Interest on Response Costs shall begin to accrue on the date of the bill and shall continue to accrue until the date of payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to the United States by virtue of Respondent's failure to make timely payments under this Section, including but not limited to, payment of stipulated penalties pursuant to Section XVII.

38. Respondent may dispute all or part of a bill for Response Costs submitted under this Agreement, if Respondent alleges that EPA has made an accounting error, or if Respondent alleges that a cost item is inconsistent with the NCP. If any dispute over costs is resolved before payment is due, the amount due will be adjusted as necessary. If the dispute is not resolved before payment is due, Respondent shall pay the full amount of the uncontested costs to EPA as specified in Paragraph 36 on or before the due date. Within the same time period, Respondent shall pay the full amount of the contested costs into an interest-bearing escrow account. Respondent shall simultaneously transmit a copy of both checks to the addressee listed in Paragraph 36(c) above. Respondent shall ensure that the prevailing party or parties in the dispute shall receive the amount on which it prevailed from the escrow funds plus interest within ten (10) days after the dispute is resolved.

XVI. DISPUTE RESOLUTION

39. Unless otherwise expressly provided for in this Agreement, the dispute resolution procedures of this Section shall be the exclusive mechanism for resolving disputes arising under this Agreement. The Parties shall attempt to resolve any disagreements concerning this Agreement expeditiously and informally.

40. If Respondent objects to any EPA action taken pursuant to this Agreement, including billings for Response Costs, it shall notify EPA in writing of its objections within fourteen (14) days of such action, unless the objections have been resolved informally. EPA and Respondent shall have thirty (30) days from EPA's receipt of Respondent's written objections to resolve the dispute through formal negotiations (the "Negotiation Period"). The Negotiation Period may be extended at the sole discretion of EPA.

41. Any agreement reached by the parties pursuant to this Section shall be in writing and shall, on signature by both parties, be incorporated into and become an enforceable part of this Agreement. If the Parties are unable to reach an agreement within the Negotiation Period, an EPA management official at the branch level or higher will issue a written decision on the

dispute to Respondent. EPA's decision shall be incorporated into and become an enforceable part of this Agreement. Respondent's obligations under this Agreement shall not be tolled by submission of any objection for dispute resolution under this Section. Following resolution of the dispute, as provided by this Section, Respondent shall fulfill each requirement that was the subject of a dispute in accordance with the agreement reached or with EPA's decision, whichever occurs.

XVI. FORCE MAJEURE

42. Respondent agrees to perform all requirements of this Agreement within the time limits established under this Agreement, unless the performance is delayed by a *force majeure*. For purposes of this Agreement, a *force majeure* is defined as any event arising from causes beyond the control of Respondent, or of any entity controlled by Respondent, including but not limited to its contractors and subcontractors, which delays or prevents performance of any obligation under this Agreement despite Respondent's best efforts to fulfill the obligation. *Force majeure* does not include financial inability to complete the response action or any increased cost of performance.

43. If any event occurs or has occurred that may delay the performance of any obligation under this Agreement, whether or not caused by a *force majeure* event, Respondent shall notify EPA orally within three (3) days of when Respondent first knew that the event might cause a delay. Within two (2) days thereafter, Respondent shall provide to EPA in writing an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Respondent's rationale for attributing such delay to a *force majeure* event if it intends to assert such a claim; and a statement as to whether, in the opinion of Respondent, such event may cause or contribute to an endangerment to public health, welfare or the environment. Failure to comply with the above requirements shall preclude Respondent from asserting any claim of *force majeure* for that event for the period of time of such failure to comply and for any additional delay caused by such failure.

44. If EPA agrees that the delay or anticipated delay is attributable to a *force majeure* event, the time for performance of the obligations under this Agreement that are affected by the *force majeure* event will be extended by EPA for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the *force majeure* event shall not, of itself, extend the time for performance of any other obligation. If EPA does not agree that the delay or anticipated delay has been or will be caused by a *force majeure* event, EPA will notify Respondent in writing of its decision. If EPA agrees that the delay is attributable to a *force majeure* event, EPA will notify Respondent in writing of the length of the extension, if any, for performance of the obligations affected by the *force majeure* event.

XVII. STIPULATED PENALTIES

45. Respondent shall be liable to EPA for stipulated penalties in the amounts set forth in Paragraphs 46 for failure to comply with the requirements of this Agreement, as specified below, unless excused under Section XVI (*Force Majeure*). "Compliance" by Respondent shall include completion of the activities under this Agreement or any work plan or other plan approved under this Agreement within the specified time schedules established by and approved under this Agreement.

46. Stipulated Penalty Amounts - Work.

a. The following stipulated penalties shall accrue per violation per day for any noncompliance with this Agreement:

Penalty Per Violation Per Day	Period of Noncompliance
$ 500	1st through 14th day
$ 1,250	15th through 30th day
$ 2,500	31st day and beyond

47. In the event that EPA assumes performance of a portion or all of the response action pursuant to Paragraph 57 of Section XIX, Respondent shall be liable for a stipulated penalty in the amount of $5,000.

48. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue: 1) with respect to a deficient submission under Section VIII (Work to be Performed), during the period, if any, beginning on the 31st day after EPA's receipt of such submission until the date that EPA notifies Respondent of any deficiency; and 2) with respect to a decision by the EPA Management Official under Paragraph 41 of Section XVI (Dispute Resolution), during the period, if any, beginning on the 21st day after the Negotiation Period begins until the date that the EPA management official issues a final decision regarding such dispute. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Agreement.

49. Following EPA's determination that Respondent has failed to comply with a requirement of this Agreement, EPA may give Respondent written notification of the failure and describe the noncompliance. EPA may send Respondent a written demand for payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether EPA has notified Respondent of a violation.

50. All penalties accruing under this Section shall be due and payable to EPA within thirty (30) days of Respondent's receipt from EPA of a demand for payment of the penalties, unless Respondent invokes the dispute resolution procedures under Section XV (Dispute

Resolution). All payments to EPA under this Section shall indicate that the payment is for stipulated penalties and otherwise be paid as directed in Paragraph 36(b) and (c).

51. The payment of penalties shall not alter in any way Respondent's obligation to complete performance of the response action required under this Agreement.

52. Penalties shall continue to accrue during any dispute resolution period, but need not be paid until fifteen (15) days after the dispute is resolved by agreement or by receipt of EPA's decision.

53. If Respondent fails to pay stipulated penalties when due, EPA may institute proceedings to collect the penalties, as well as Interest. Respondent shall pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraph 50. Nothing in this Agreement shall be construed as prohibiting, altering, or in any way limiting the ability of EPA to seek any other remedies or sanctions available by virtue of Respondent's violation of this Agreement or of the statutes and regulations on which it is based, including, but not limited to, penalties pursuant to Sections 106(b) and 122(*l*) of CERCLA, 42 U.S.C. §§ 9606(b) and 9622(*l*), and punitive damages pursuant to Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3). Provided, however, that EPA shall not seek civil penalties pursuant to Section 106(b) or 122(*l*) of CERCLA or punitive damages pursuant to Section 107(c)(3) of CERCLA for any violation for which a stipulated penalty is provided herein, except in the case of a willful violation of this Agreement or in the event that EPA assumes performance of a portion or all of the response action pursuant to Section XIX. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Agreement.

XVIII. COVENANT NOT TO SUE BY EPA

54. In consideration of the actions that will be performed and the payments that will be made by Respondent under the terms of this Agreement, and except as otherwise specifically provided in this Agreement, EPA covenants not to sue or to take administrative action against Respondent pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), for performance of the response action and for recovery of Response Costs. This covenant not to sue shall take effect on the Effective Date and is conditioned on the complete and satisfactory performance by Respondent of all obligations under this Agreement, including, but not limited to, payment of Response Costs pursuant to Section XIV. This covenant not to sue extends only to Respondent and does not extend to any other person.

XIX. RESERVATIONS OF RIGHTS BY EPA

55. Except as specifically provided in this Agreement, nothing herein shall limit the power and authority of EPA or the United States to take, direct, or order all actions necessary to protect public health, welfare, or the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances, pollutants or contaminants, or hazardous or solid

waste on, at, or from the Site. Further, nothing herein shall prevent EPA from seeking legal or equitable relief to enforce the terms of this Agreement, from taking other legal or equitable action as it deems appropriate and necessary, or from requiring Respondent in the future to perform additional activities pursuant to CERCLA or any other applicable law.

56. The covenant not to sue set forth in Section XVIII above does not pertain to any matters other than those expressly identified therein. EPA reserves, and this Agreement is without prejudice to, all rights against Respondent with respect to all other matters, including, but not limited to:

a. claims based on a failure by Respondent to meet a requirement of this Agreement;

b. liability for costs not included within the definitions of Response Costs;

c. liability for performance of response action other than the response action required by this Agreement;

d. criminal liability;

e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;

f. liability arising from the past, present, or future disposal, release or threat of release of hazardous substances outside of the Site; and

g. liability for costs incurred or to be incurred by the Agency for Toxic Substances and Disease Registry related to the Site.

57. Work Takeover. In the event EPA determines that Respondent has ceased implementation of any portion of the response action, is seriously or repeatedly deficient or late in its performance of the response action, or is implementing the response action in a manner that may cause an endangerment to human health or the environment, EPA may assume the performance of all or any portion of the response action as EPA determines necessary. Respondent may invoke the procedures set forth in Section XVI (Dispute Resolution) to dispute EPA's determination that takeover of the response action is warranted under this Paragraph. Costs incurred by the United States in performing the response action pursuant to this Paragraph shall be considered Response Costs that Respondent shall pay pursuant to Section XIV (Payment of Response Costs). Notwithstanding any other provision of this Agreement, EPA retains all authority and reserves all rights to take any and all response actions authorized by law.

XX. COVENANT NOT TO SUE BY RESPONDENT

58. Respondent covenants not to sue and agrees not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to the response action, Response Costs, or this Agreement, including, but not limited to:

a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund established by 26 U.S.C. § 9507, based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claim arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the California Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; or

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to the Site.

Except as provided in Paragraph 60 (Waiver of Claims), these covenants not to sue shall not apply in the event the United States brings a cause of action or issues an order pursuant to the reservations set forth in Paragraphs 56 (b), (c), and (e) - (g), but only to the extent that Respondent's claims arise from the same response action, response costs, or damages that the United States is seeking pursuant to the applicable reservation.

59. Nothing in this Agreement shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

60. Waiver of Claims. Respondent agrees not to assert any claims and to waive all claims or causes of action that it may have for all matters relating to the Site, including for contribution, against any person where the person's liability to Respondent with respect to the Site is based solely on having arranged for disposal or treatment, or for transport for disposal or treatment, of hazardous substances at the Site, or having accepted for transport for disposal or treatment of hazardous substances at the Site, if the materials contributed by such person to the Site containing hazardous substances did not exceed the greater of i) 0.002% of the total volume of waste at the Site, or ii) 110 gallons of liquid materials or 200 pounds of solid materials. This waiver shall not apply to any claim or cause of action against any person meeting the above criteria if EPA has determined that the materials contributed to the Site by such person contributed or could contribute significantly to the costs of response at the Site. This waiver also shall not apply with respect to any defense, claim, or cause of action that a Respondent may have against any person if such person asserts a claim or cause of action relating to the Site against such Respondent.

XXI. OTHER CLAIMS

61. By issuance of this Agreement, the United States and EPA assume no liability for injuries or damages to persons or property resulting from any acts or omissions of Respondent. The United States or EPA shall not be deemed a party to any contract entered into by Respondent or its directors, officers, employees, agents, successors, representatives, assigns, contractors, or consultants in carrying out actions pursuant to this Agreement.

62. Except as expressly provided in Section XX, Paragraph 60, and Section XVIII (Covenant Not to Sue by EPA), nothing in this Agreement constitutes a satisfaction of or release from any claim or cause of action against Respondent or any person not a party to this Agreement, for any liability such person may have under CERCLA, other statutes, or common law, including but not limited to any claims of the United States for costs, damages and interest under Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607.

63. No action or decision by EPA pursuant to this Agreement shall give rise to any right to judicial review, except as set forth in Section 113(h) of CERCLA, 42 U.S.C. § 9613(h).

XXII. CONTRIBUTION PROTECTION

64. The Parties agree that Respondent is entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), for "matters addressed" in this Agreement. The "matters addressed" in this Agreement are the response action required in Section VIII and Response Costs. Except as provided in Section XX, Paragraph 60 of this Agreement, nothing in this Agreement precludes the United States or Respondent from asserting any claims, causes of action, or demands against any persons not parties to this Agreement for indemnification, contribution, or cost recovery.

XXIII. INDEMNIFICATION

65. Respondent shall indemnify, save and hold harmless the United States, its officials, agents, contractors, subcontractors, employees and representatives from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Respondent, its officers, directors, employees, agents, contractors, or subcontractors, in carrying out actions pursuant to this Agreement. In addition, Respondent agrees to pay the United States all costs incurred by the United States, including but not limited to attorneys fees and other expenses of litigation and settlement, arising from or on account of claims made against the United States based on negligent or other wrongful acts or omissions of Respondent, its officers, directors, employees, agents, contractors, subcontractors and any persons acting on its behalf or under their control, in carrying out activities pursuant to this Agreement. The United States shall not be held out as a party to any contract entered into by or on behalf of Respondent in carrying out activities pursuant to this Agreement. Neither Respondent nor any such contractor shall be considered an agent of the United States.

66. The United States shall give Respondent notice of any claim for which the United States plans to seek indemnification pursuant to this Section and shall consult with Respondent prior to settling such claim.

67. Respondent waives all claims against the United States for damages or reimbursement or for set-off of any payments made or to be made to the United States, arising from or on account of any contract, agreement, or arrangement between Respondent and any person for performance of the response action on or relating to the Site, including, but not limited to, claims on account of construction delays. In addition, Respondent shall indemnify and hold harmless the United States with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between Respondent and any person for performance of the response action on or relating to the Site, including, but not limited to, claims on account of construction delays.

XXIV. INSURANCE

68. At least three (3) days prior to commencing any on-Site work under this Agreement, Respondent shall secure, and shall maintain for the duration of this Agreement, comprehensive general liability insurance and automobile insurance with limits of $500,000 dollars, combined single limit. Within the same time period, Respondent shall provide EPA with certificates of such insurance and a copy of each insurance policy. In addition, for the duration of the Agreement, Respondent shall satisfy, or shall ensure that their contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing the response action on behalf of Respondent in furtherance of this Agreement. If Respondent demonstrates by evidence satisfactory to EPA that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering some or all of the same risks but in an equal or lesser amount, then Respondent need only provide that portion of the insurance described above that is not maintained by such contractor or subcontractor.

XXV. MODIFICATIONS

69. The OSC may make modifications to any plan or schedule in writing or by oral direction. Any oral modification will be memorialized in writing by EPA promptly, but shall have as its effective date the date of the OSC's oral direction. Any other requirements of this Agreement may be modified in writing by mutual agreement of the parties.

70. If Respondent seeks permission to deviate from any approved work plan or schedule, Respondent's Project Coordinator shall submit a written request to EPA for approval outlining the proposed modification and its basis. Respondent may not proceed with the requested deviation until receiving oral or written approval from the OSC pursuant to Paragraph 69.

71. No informal advice, guidance, suggestion, or comment by the OSC or other EPA representatives regarding reports, plans, specifications, schedules, or any other writing submitted

by Respondent shall relieve Respondent of its obligation to obtain any formal approval required by this Agreement, or to comply with all requirements of this Agreement, unless it is formally modified.

XXVI. ADDITIONAL REMOVAL ACTION

72. If EPA determines that additional removal actions not included in an approved plan are necessary to protect public health, welfare, or the environment, EPA will notify Respondent of that determination. Unless otherwise stated by EPA, within thirty (30) days of receipt of notice from EPA that additional removal actions are necessary to protect public health, welfare, or the environment, Respondent shall submit for approval by EPA a Work Plan for the additional removal actions. The plan shall conform to the applicable requirements of Section VIII (Work to Be Performed) of this Agreement. On EPA's approval of the plan pursuant to Section VIII, Respondent shall implement the plan for additional removal actions in accordance with the provisions and schedule contained therein. This Section does not alter or diminish the OSC's authority to make oral modifications to any plan or schedule pursuant to Section XXV (Modifications).

XXVII. NOTICE OF COMPLETION OF WORK

73. When EPA determines, after EPA's review of the Final Report, that all work has been fully performed in accordance with this Agreement, with the exception of any continuing obligations required by this Agreement, EPA will provide written notice to Respondent. If EPA determines that any such work has not been completed in accordance with this Agreement, EPA will notify Respondent, provide a list of the deficiencies, and require that Respondent modify the Work Plan if appropriate in order to correct such deficiencies. Respondent shall implement the modified and approved Work Plan and shall submit a modified Final Report in accordance with the EPA notice. Failure by Respondent to implement the approved modified Work Plan shall be a violation of this Agreement.

XXVIII. SEVERABILITY/INTEGRATION

74. If a court issues an order that invalidates any provision of this Agreement or finds that Respondent has sufficient cause not to comply with one or more provisions of this Agreement, Respondent shall remain bound to comply with all provisions of this Agreement not invalidated or determined to be subject to a sufficient cause defense by the court's order.

75. This Agreement constitutes the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Agreement. The parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Agreement.

XXIX. EFFECTIVE DATE

76. This Agreement shall be effective when received by Respondent after the Agreement is signed by the Regional Administrator or his/her delegatee.

Each undersigned representative of the Parties is authorized to enter into the terms and conditions of this Agreement and to bind the parties to this document.

Agreed this 10th day of May, 2004.

For Respondent Conoco Hawaii Ltd. Partnership LLC

By _____

Title Vice President

[EPA's signature on following page.]

It is so ORDERED and Agreed this 17 day of May, 2004.

BY: Daniel A Meer DATE: 17 May 2004

Daniel A. Meer
Branch Chief, Response, Planning and Assessment Branch
U.S. Environmental Protection Agency, Region 9